Supreme Court, U.S.
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No. 00-141

In The

Supreme Court of the United States

E. CHUMA WADIBIA,

Petitioner,

v.

AUBURN UNIVERSITY, R. LEE EVANS, in his individual and official capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Defendants-Respondents Auburn University and R. Lee Evans[1] respectfully request that this Court deny the petition herein for a writ of certiorari for review of the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on January 25, 2000.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On July 10, 1998, Petitioner E. Chuma Wadibia ("Wadibia") filed suit in the United States District Court for the Southern District of Alabama against Auburn University ("Auburn") and R. Lee Evans, Dean of Auburn's School of Pharmacy. Wadibia alleged that, in violation of Title VII, 42 U.S.C. § 2000e and 42 U.S.C. § 1981, he was discriminated against on the basis of race and national origin in that he was subjected to a racially hostile environment and that he was retaliated against for complaints of alleged discrimination and harassment. Wadibia further alleged that his fifth and fourteenth amendments rights were violated when he was placed on administrative leave with pay pending an investigation into an altercation between him and a co-employee. On

[1] Dean Evans was named as a defendant in the complaint and was dismissed on summary judgment. Wadibia's appeal to the Eleventh Circuit did not include Dean Evans, but only Auburn University.

May 17, 1999, the district court granted Wadibia's motion to amend the complaint to allege that Wadibia was terminated effective February 10, 1999 in retaliation for filing a charge of discrimination with the Equal Employment Opportunity Commission and filing suit against Auburn. Neither the original complaint nor the amended complaint alleged that Wadibia was terminated because of race or national origin. See Appendix 3-5; Petitioner's Appendix B at 3a, 25a-25b.

On August 26, 1999, the district court ordered that the defendants' motion for summary judgment be granted in its entirety and that the action be dismissed. Wadibia appealed the following claims to the United States Court of Appeals for the Eleventh Circuit: (1) the Title VII disparate treatment claim as to Wadibia's being placed on administrative leave during Auburn's investigation into his altercation with a co-employee; (2) the hostile environment claim – which was premised on one alleged racial slur by a co-employee; and (3) the retaliation claim, which was premised on the reassignment of one student during the time Wadibia was on paid administrative leave and Wadibia's termination more than one year after he allegedly engaged in protected activity. Through his new appellate counsel, Wadibia raised in the Eleventh Circuit a claim he did not make in the district court – a claim that his termination was racially motivated. Wadibia did not appeal the dismissal of the claims against R. Lee Evans. On January 25, 2000, the Eleventh Circuit "affirm[ed] the district court's judgment based on its well-reasoned order filed on August 26, 1999." Appendix 2; *Wadibia v. Auburn University*, 208 F.3d 1013 (2000)

(table). Wadibia filed a petition for rehearing or rehearing en banc which was denied on April 25, 2000. *Id.*

B. Statement of Facts

A thorough statement of the facts is set out in the district court's summary judgment decision. Petitioner's Appendix B at 3a-19a.

Wadibia, a native of Nigeria, was employed by Auburn as an Assistant Professor in the School of Pharmacy beginning July 1, 1996. He was assigned to work in Mobile, Alabama at the University of South Alabama College of Medicine ("South Alabama"), with which Auburn's School of Pharmacy had a cooperative program. In this program, Auburn pharmacy students gain clinical experience under the supervision of Auburn faculty, like Wadibia. In addition to supervising Auburn students, the Auburn faculty work with South Alabama medical faculty on clinical pharmacy and collaborative research matters. Wadibia in particular was assigned to precept two students for approximately 35 weeks each year and, among other responsibilities, to work with South Alabama's Department of Cardiology.

Wadibia's Auburn faculty colleagues in Mobile were concerned about his competence almost from the time of his arrival. Within months, students and faculty began reporting to Dr. Robert Smith, Wadibia's Department Head, their complaints and concerns about Wadibia, including that Wadibia was giving incorrect information to students and medical teams. Wadibia offered no evidence to dispute that such complaints were made or that

Auburn had reason to be concerned about his performance. Petitioner's Appendix B at 7a ¶¶ 9, 10.

In the summer of 1997, Wadibia failed to prepare properly for the arrival of his students, who had to be taken care of by a faculty colleague. This colleague, Dr. Eileen Holland, received complaints about Wadibia throughout the summer, which she reported to Department Head Smith. Wadibia presented no evidence that such complaints were not made or that they were not communicated to the administration.

In September of 1997, the Auburn faculty working at South Alabama began having weekly meetings, and Dr. Holland, as the senior faculty member, was designated coordinator. One of the purposes of the meetings was to hear presentations from students. Wadibia did not dispute that he frequently missed these meetings or left early.

The first student to appear at the weekly meetings was L.A., one of Wadibia's students. The student's presentation was quite poor and the faculty agreed that significant improvement would be required if the student expected to complete the rotation successfully. Dr. Holland volunteered to work with L.A. and, in the course of subsequent discussions with Wadibia, Wadibia admitted that he was not going on rounds with the student, who was – against the faculty's instructions – being allowed in patient care situations without supervision.

Another faculty meeting was held soon thereafter, at which the faculty discussed their recent activities. Wadibia was asked about his work, including efforts he had made to assist L.A., who was scheduled to make another

presentation at that day's meeting. During L.A.'s presentation, Wadibia told Holland that he needed to speak with her outside. Holland followed Wadibia out of the room. Wadibia then confronted Holland and told her that she was not his supervisor, that she had no right to question him about his activities or his students, and that if she had a problem with Wadibia she should talk to Dr. Smith, the Department Head. Holland told Wadibia that she was concerned about Auburn's students and that she had already spoken with Smith and communicated her opinion that Wadibia was incompetent and not providing a good educational experience for the students. Holland told Wadibia that she needed to return to the presentation and that the hallway was not the place to have such a discussion. Wadibia told Holland he was not finished with her, then moved towards her, continuously shaking his finger in her face. Holland later reported to Smith that Wadibia "got right in [her] face," "gritted his teeth" at her, "hissed and grunted" at her, and called her an "idiot fool." According to Holland, Wadibia acted in a threatening and violent manner, came very close to having physical contact with her, knocked a bulletin board off the wall, and was generally out of control. Shortly after this confrontation, Holland reported to Smith and others that she was in fear for her safety. Smith believed Holland was genuine and sincere in her concern.

The following day, Smith spoke with Wadibia, who confirmed that the confrontation with Holland had occurred. Wadibia added that, during the confrontation, Holland had referred to him as "nigger boy." Holland adamantly denied making the alleged comment. Smith consulted with Dr. Lee Evans, Dean of the School of

Pharmacy. Not knowing exactly what had happened or who was at fault, Evans and Smith decided that, in everyone's best interest, Wadibia should be temporarily removed from the workplace while an investigation of the incident was conducted. On October 17, 1997, Wadibia was placed on "Administrative Leave with Pay."

After carefully reviewing the information secured through his investigation, Smith concluded that, while Wadibia had initiated the incident and acted improperly toward Holland, there was no substantial likelihood that Holland would be in danger of future physical harm from Wadibia. Smith determined that the altercation was a one-time event precipitated by Wadibia's perception that Holland was improperly interfering with the instruction of his students. Because Wadibia was adamant that Holland had used a racial slur, and Holland was just as adamant that she had not, Smith made no determination on that issue. Smith counseled Holland that racial slurs in the workplace would not be tolerated.

No disciplinary or other adverse personnel action was taken against Wadibia as a result of the confrontation with Holland. He suffered no loss of pay or benefits, he was advised that he could return to work, and he did so with all his previous responsibilities and without any restrictions. Wadibia admits he had no further problems with Holland after he returned from administrative leave with pay.

Wadibia claims that Auburn retaliated against him by reassigning his students during the period of time he was on leave. The only student assigned to Wadibia at that time was L.A, who had approximately six days left on her

cardiology rotation when she was reassigned to Holland, from whom L.A. was already seeking assistance. Wadibia offered no evidence that any other student supervised by him was reassigned during the administrative leave or thereafter. Wadibia offered no evidence that Auburn did anything to prevent students from self-selecting Wadibia as their preceptor.

A few days after his temporary leave began, Wadibia filed a complaint with Auburn's AA/EEO office. He alleged that, in connection with the Holland incident and the resulting leave, he was being subjected to racial harassment and workplace discrimination. Following an investigation, the AA/EEO office advised Wadibia that it

> could find no evidence to support [his] allegation that [Holland's] treatment of [Wadibia] was in any way negatively influenced by [his] race. It is my opinion that Dr. Holland has not violated the University's policy prohibiting discrimination on the basis of race. With regard to the complaint against the School of Pharmacy, I could find no evidence that your temporary administrative leave was related to your race.

In early January 1998, Smith contacted Wadibia to discuss how things were going. Wadibia inexplicably warned Smith "not to try anything." Smith advised Wadibia in writing that Wadibia's "warning" was totally inappropriate and unprofessional. During the following several months, Dr. Smith and Dean Evans continued to monitor Wadibia's work performance, which remained sub-standard. They began to discuss the possibility that

Wadibia might have to be noncontinued due to his continued performance deficiencies and uncooperative attitude. Dean Evans and Dr. Smith sought advice from Auburn University counsel about the matter because of their increasing concerns about Wadibia.

On June 1, 1998, Smith met with Wadibia to evaluate Wadibia's performance for the prior academic year. Wadibia refused to accept Smith's assessment. Instead, Wadibia made numerous threatening statements, including a threat of negative publicity for the University, as well as Smith personally, if Smith evaluated Wadibia's performance at a level lower than Wadibia believed he deserved. Wadibia even suggested that Smith's family would not be able to survive if forced to live on Smith's wife's low salary alone. Upon his return to Auburn, Smith advised Wadibia in writing that Wadibia's behavior and comments during this meeting constituted insubordination. Wadibia was also advised that further threats would not be tolerated and that he would have to learn to respond positively to constructive criticism.

In the meantime, Dean Evans and Dr. Smith continued their discussions about whether Wadibia's employment should be terminated. In early July of 1998, no final decision had been made. On July 9, 1998, consistent with his standard practice for faculty in the Department, Smith sent a letter following up on his early June meeting with Wadibia. Smith explained that Wadibia's attitude in the June meeting had made it impossible to discuss various performance issues, and went on to set out the areas in which Wadibia would be required to improve his performance. Wadibia was advised that, in addition to improving his teaching, research, and relationships with faculty

and colleagues, he must accept constructive criticism. Wadibia was reminded that, under Auburn's policy, a third year or mid-tenure review would be conducted prior to his thirty-second month of employment. Smith offered to help Wadibia prepare his review materials.

Later in July, after literally months of deliberation, Dean Evans and Dr. Smith finally came to the conclusion that Wadibia's performance and willingness to cooperate were so deficient that, without prompt and drastic improvement, his employment would have to be terminated. Aware of the advance notice required to noncontinue a tenure-track faculty member, they decided upon a course of action that would give Wadibia a "last chance" while also protecting the interests of Auburn and its students. Accordingly, on July 31, 1998, Wadibia was advised in writing that his contract with Auburn would not be continued after January 31, 1999. Wadibia was also told, however, that if he were to make satisfactory improvements in specified areas, his noncontinuation might be reconsidered. Wadibia does not dispute that he was instructed to submit documentation of his interactions and activities with Auburn faculty as well as the Pharmacy Director and to provide Smith with a monthly written report of his efforts to improve. Wadibia admits that he failed to submit this documentation.

In addition to failing to submit the documentation required under the July 31, 1998 letter, Wadibia also failed to modify his performance. Smith attempted to meet or speak with Wadibia on several occasions to discuss Wadibia's performance. Wadibia admits that he consistently refused to meet or speak with Smith.

In October 1998, Smith requested that Wadibia meet with him to discuss his goals for the 1998-99 academic year and to discuss preparation of the material for the third-year review, which would occur in February or March 1999. Smith suggested that Wadibia prepare this information in the event that his noncontinuation were reconsidered. Because the review would occur in February or March, 1999, it would be all but impossible for Wadibia to prepare information between the time his noncontinuation was reconsidered and the third-year review.

Wadibia refused to meet with Smith until November 1998. During this meeting, Smith explained the purpose of the third-year review and that it would be conducted only if the noncontinuation decision were reconsidered. Smith believed that, if Wadibia's performance improved, the information gathered for the third-year review might help Wadibia demonstrate sufficient improvement to justify reconsideration of his noncontinuation. Smith also gave Wadibia specific suggestions for improvement. Smith repeatedly expressed regret that Wadibia had failed to meet with Smith sooner to address the deficiencies outlined in the July 1998 letter. Smith and Wadibia met again on December 1, 1998. Smith told Wadibia that, while it appeared that Wadibia was making some progress in addressing some of the deficiencies outlined in the July 1998 letter, he had not made sufficient progress and that his refusal to initiate this process sooner might prevent him from making sufficient progress to justify reconsideration of his noncontinuation. Smith again gave Wadibia specific suggestions for improvement.

In late January 1999, Dean Evans, with the input of Dr. Smith, reviewed Wadibia's performance since the July 1998 notice of noncontinuation was issued. Wadibia had failed to improve his performance in the specified areas, failed to provide the required documentation, and engaged in repeated acts of insubordination and unprofessional behavior. As a result, the University terminated Wadibia's employment effective February 10, 1999.

During the time Wadibia was employed, students were allowed to select the site of their clinical rotation and their faculty supervisor. Student preferences were accommodated to the extent possible. The evidence was undisputed that Wadibia received poor evaluations from students regarding his clinical rotation and teaching. Students frequently complained of Wadibia's arrogance and lack of concern for students. Wadibia's lack of students was attributable to the manner in which he conducted himself and his resulting poor reputation among students.

Wadibia argues on page seven of his petition that he established pretext because he "presented evidence that his teaching evaluations were not the lowest; other white employees had lower evaluations; and Smith testified that Wadibia's scholarship was in fact average." In fact, students evaluated Wadibia as follows:

> There is absolutely no reason for Dr. Wadibia or someone like Dr. Wadibia to be on the Auburn faculty.
>
> He is stubborn – which is evidenced in his arrogant responses to our challenges . . . I honestly think he should not teach at this school – he is

> not good enough to earn a position in this school.
>
> Dr. Wadibia had the most awful lecture and test of the quarter . . . We pay entirely too much money to have to suffer with such a poor quality of lecture . . . Dr. Wadibia seems to be an intelligent person, but he is a weak point in the program at Auburn.
>
> Dr. Wadibia should *not* be teaching. He *cannot* convey material where the students can understand. When questions are asked he cannot relate the material. He also had a hard time writing questions that were not ambiguous. My overall opion [sic] of Dr. Wadibia as an instructor is extremely poor. I will do my best to never have him as an instructor/preceptor again.

In contrast, the only evidence Wadibia could adduce to "support" his teaching performance was that, in an evaluation of two courses, he ranked 12th out of 13 faculty in the Department, and thus was not the poorest in the faculty.

Auburn does not dispute that Smith found Wadibia's scholarship, to the extent it existed, to be worthwhile, in the sense that it was not "at the bottom." This does not mean, however, that Auburn was satisfied with Wadibia's research efforts. As Smith explained on deposition, Wadibia had repeatedly been advised to seek and secure extramural funding. In two and one half years, Wadibia failed to obtain even one clinical drug study.

SUMMARY OF ARGUMENT

Wadibia argues that the decisions below cannot be squared with *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). He claims that he presented sufficient evidence of the falsity of the reasons articulated by Auburn for its adverse personnel actions to warrant a jury trial on the question of Auburn's discriminatory intent, and that *St. Mary's* requires that outcome. Review is not warranted in this case, however, for two very basic reasons. First, the district court concluded that Wadibia failed to establish a prima facie case of discrimination or retaliation, such that it was not necessary to even reach the pretext issue and apply *St. Mary's*. While the district court did address the pretext issue in the alternative, it did not misapply or ignore *St. Mary's*, which would govern only where there is substantial evidence calling into question the veracity of the employer's explanation. Wadibia adduced no evidence of falsity of Auburn's explanation for the actions taken against Wadibia, *St. Mary's* was therefore not implicated, and Wadibia's pretext argument simply failed for lack of proof.

Wadibia also seeks review based on the contention that the Eleventh Circuit's decision conflicts with prior decisions of that same circuit. Intra-circuit conflicts do not, however, warrant certiorari review by this Court. Wadibia's substantive argument is that summary judgment was improperly granted because Auburn based its decision to terminate Wadibia strictly on subjective criteria. Even if such a sweeping generalization were the law – which it is not – Auburn's decision was actually based on

a number of grounds, several of which were non-subjective. In any case, Wadibia did not make a claim for racially motivated termination in the district court, which is another basis for denying certiorari.

Wadibia essentially seeks certiorari review to have this Court correct perceived error by the district court and the Eleventh Circuit in applying settled rules of law. As stated in this Court's Rule 10, this is not a basis for granting certiorari.

ARGUMENT

The considerations governing review by this Court on a petition for writ of certiorari are set forth in Rule 10 of the Rules of the Supreme Court of the United States. Neither of the questions presented for review by Petitioner meets the criteria contained in Rule 10. Thus there is no reason for the Court to review this case.

This Court's Rule 10 provides as follows:

Rule 10: Considerations Governing Review on Certiorari

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of

> appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

I. There is No Conflict Between the Decision Below and This Court's Decision in *St. Mary's Honor Center v. Hicks.*

As the first basis for his petition, Wadibia argues that the Eleventh Circuit's decision "cannot be squared with Supreme Court precedent," Petition at 4, namely *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993). Petition at 4-6. In *St. Mary's*, this Court addressed the question whether, in a suit against

an employer alleging intentional race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff. *Id.*, 509 U.S. at 504. This Court answered this question in the negative, concluding that rejection of the proffered reasons *permits* the trier of fact to infer the ultimate fact of intentional discrimination, without additional evidence, but does not *compel* such a finding. *Id.*, 509 U.S. at 511. As this Court explained, the Title VII plaintiff at all times bears the "ultimate burden of persuasion." *Id.*

Wadibia invokes *St. Mary's* for the proposition that, on a disparate treatment claim based on circumstantial evidence, a plaintiff's evidence tending to prove the falsity of an employer's proffered reason for a challenged adverse employment action is in and of itself enough to survive summary judgment. Petition at 5. Wadibia's argument suggests (incorrectly) that he presented sufficient evidence to cast doubt on the veracity of Auburn University's explanations for "the adverse employment actions," and was therefore "entitled to have a trier of fact determine whether the falsity of the proffered reason, alone, is sufficient evidence to conclude that [Auburn] unlawfully discriminated." *Id.*

In the abstract, Auburn does not disagree with the proposition that, in appropriate circumstances, the trier of fact can reasonably infer from the falsity of the employer's explanation that "the employer is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing Prod.*, ___ U.S. ___, 120 S.Ct. 2097, 147 L.Ed.2d 105, 120 (2000). The present case is not one,

however, where these principles drawn from *St. Mary's* and *Reeves* even come into play, and therefore the arguments advanced by Wadibia for review by this Court are baseless.

The only claims to which Wadibia's argument could apply are (i) Wadibia's disparate treatment claim that his colleague, Dr. Holland, was not suspended following their altercation while he was, and (ii) his retaliatory discharge claim.[2] On neither claim did the district court commit error, either through failing to properly apply *St. Mary's* or otherwise.

A. Petitioner's Suspension Claim Was Properly Rejected Because of Lack of Proof, Not Because of Any Misapplication of *St. Mary's*.

Wadibia's argument based on *St. Mary's* could come into play only if there has been an adverse personnel action, a showing of a prima facie case, and the employer's ensuing articulation of its legitimate, non-discriminatory reason for the adverse personnel action. *See St. Mary's*, 509 U.S. at 506-09. On the claim involving his temporary paid suspension, which Wadibia claimed to have been racially motivated, the district court concluded that Wadibia established no prima facie case because he failed to show (i) any adverse employment action sufficient to trigger the federal anti-discrimination laws, or (ii) that he and Dr. Holland were similarly situated, given

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[2] As discussed in the Statement of the Case and in a later section of the argument, Wadibia made no claim in the district court for racially motivated termination.

that Wadibia was the acknowledged instigator of the episode, which he himself termed "explosive." Petitioner's Appendix B at 26a. Thus, the claim was rejected on grounds and at a stage of the analysis making it unnecessary for the district court to even consider the pretext issue of whether Wadibia had cast sufficient doubt on the veracity of Auburn's articulated reasons to warrant denial of summary judgment. Therefore, even though the district court went on to address the pretext question in the alternative, that basis for the decision below was unnecessary and is not a reason for this Court to grant certiorari.

If the pretext issue relating to the suspension claim were reviewed on the merits, this Court would see that the district court did not misapply *St. Mary's*. Contrary to the suggestions in his petition, Wadibia did *not* come forward with any evidence tending to cast doubt on the truthfulness of the reason proffered by Auburn for the temporary suspension (its concern that Wadibia may have engaged in unnecessarily aggressive conduct toward a colleague and its belief that he should be removed from the workplace temporarily to facilitate the investigation of the incident). It is more than noteworthy that the petition before this Court fails to identify any evidence of pretext offered by Wadibia below. The petition states only in the most conclusory terms that "Wadibia further presented evidence that [Auburn's] proffered reasons for their acts were false. . . . " Petition at 3. The simple fact is that there was no such evidence.

The district court did not misapply or fail to apply *St. Mary's*, as Petitioner contends. Instead, the court rejected Petitioner's suspension claim on another basis, and, in

addressing the pretext argument in the alternative, correctly concluded that the argument simply failed for lack of evidence. The first reason for granting certiorari advanced by the Petitioner – an irreconcilable conflict with *St. Mary's* – is therefore baseless.[3]

B. Petitioner's Retaliation Claim Was Dismissed for Failure of Proof and Not for Reasons Inconsistent with *St. Mary's*.

The second claim on which the *St. Mary's* pretext issue could have arisen is Wadibia's claim of retaliatory discharge. In rejecting this claim, the district court concluded that Wadibia had not only failed to establish a prima facie case of retaliation,[4] he had in any event also failed to submit evidence sufficient to create a jury issue as to pretext.[5] Petitioner's Appendix B at 28a.

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[3] The commentators observe that, to warrant review on certiorari, a case must present a *clear* conflict with Supreme Court precedent. *23 Moore's Federal Practice*, § 510.42[1] (Mathew Bender 3d ed.). Even if *St. Mary's* were in the picture, this case presents no *clear* failure to follow it.

[4] "Even if the court accepted the premise, *which it does not*, that Wadibia submitted sufficient evidence to establish that (1) his EEOC charges were based on his objectively reasonableness [*sic*] belief as "measured against existing substantive law" that his employer has engaged in an unlawful employment practice and (2) there existed a causal connection between those charges and his termination. . . . " Petitioner's Appendix B at 28a (emphasis added).

[5] The district court also rejected Petitioner's retaliation claim on the basis that, even if Petitioner had engaged in protected conduct that somehow affected the termination decision, "the same employment decision would have been

Auburn had ample reasons for discharging Wadibia that it articulated in the district court. He was sharply criticized by students and his faculty colleagues for poor performance and lack of professionalism. He ignored numerous requests and instructions from his supervisor to meet and discuss his performance deficiencies, electing instead to threaten his supervisor and his employer. His teaching and research were unacceptable, as evidenced by student evaluations and the fact that Wadibia failed to obtain funding for even one clinical drug study. Wadibia even failed, when given a last chance to improve, to submit documentation of improved performance. Had there been substantial evidence offered by Wadibia tending to show that *each* of the proffered reasons for Wadibia's discharge was false, *St. Mary's* would arguably have required a jury trial. Wadibia's only evidence, however, was that he was not rated the poorest teacher in the Department, that his scholarship was not "at the bottom," and that by his own self-assessment he had met the performance improvement goals required of him. Wadibia offered nothing to challenge the veracity of Auburn's reasons relating to the student evaluations, his threats against his supervisor, his poor research performance, his refusal to meet with his supervisor to discuss his performance, or his refusal to provide documentation of his

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made for legitimate reasons unrelated to . . . these complaints." Petitioner's Appendix B at 19a. Thus, even if Petitioner were correct in his *St. Mary's* contentions, the same result – summary judgment in favor of Auburn – would have prevailed. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Tanca v. Nordberg*, 98 F.3d 680 (1st Cir. 1996), *cert. denied*, 520 U.S. 1119 (1997).

efforts to improve his performance. If there had been more evidence that Auburn's stated reasons were false, surely it would be mentioned in the petition for certiorari. *See* Petition at 3 (stating only in conclusory terms that Petitioner "presented evidence that [Auburn's] proffered reasons . . . were false."). Wadibia's retaliatory discharge claim was dismissed on summary judgment not because of a misapplication of *St. Mary's*, but because he submitted insufficient proof of pretext.[6]

II. There is No Basis for Certiorari Review of Petitioner's Purported Claim of Racially Motivated Termination.

A. The Court Does Not Review Claims That Were Not Asserted Below.

Wadibia urges this Court to review his supposed claim that "race discrimination motivated his termination." Petition at 7. As discussed earlier, Wadibia made no such claim in the district court. Appendix 3-5; Petitioner's Appendix B at 3a, 25a-25b. It is a well-settled general rule that this Court will not grant certiorari to decide an issue that was not raised in the proceedings below. *See Ernst &*

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[6] If Wadibia is asking this Court to review some other retaliation claim, such as his contention that students were taken from his supervision in retaliation for his filing an EEOC charge, *see* Petition at 3, he fails completely to identify any evidence that Auburn took such action or that Auburn's explanation for anything it did relating to students was false or otherwise pretextual. As explained in the accompanying text, the petition makes broad statements, but identifies no evidence that was placed before the district court.

Ernst v. Hochfelder, 425 U.S. 185, 194 n.13, 96 S.Ct. 1375, 47 L.Ed.2d 668, *reh'g denied*, 425 U.S. 986 (1976); *23 Moore's Federal Practice*, § 510.41[3][e][ii] (Mathew Bender 3d ed.)

B. Certiorari Is Not to be Granted to Review Alleged Conflicts Between Panels in the Same Federal Circuit.

Even if the claim of race-based termination had been made below, there is still no basis for certiorari review. Wadibia seeks such review based on the argument that "[t]he decision below also conflicts with previous opinions of the Eleventh Circuit." Petition at 6. Wadibia then argues at some length that the Eleventh Circuit's decision herein is inconsistent with other decisions from that same court which Wadibia interprets to stand for the proposition that employment decisions based solely on the application of subjective criteria are inherently suspect and not subject to disposition on summary judgment. *Id.* at 6-7.

Nothing in this Court's Rule 10 suggests that review by certiorari is appropriate where the challenged decision by a court of appeals is alleged to be inconsistent with earlier decisions of that same court. Rule 10 discusses certiorari review of a decision by a United States court of appeals that conflicts with a decision of *another* federal court of appeals on the same important matter, Rule 10(a); a decision by a court of appeals on an important federal question that conflicts with a decision of a state court of last resort, *id.*; and a decision by a United States court of appeals that conflicts – on an important federal question – with a relevant decision of this Court. Rule 10(c). Rule 10 does not mention, however, review based

on allegedly conflicting decisions *within the same circuit. See 23 Moore's Federal Practice*, § 510.21[2], *citing Harlan, Manning The Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958) ("Likewise, contrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself."); *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S.Ct. 633, 1 L.Ed.2d 658 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Wadibia's effort to secure review by this Court of this case, on the basis that the Eleventh Circuit has disagreed with itself, is unavailing.

C. The Decision to Terminate Petitioner Was Not Based Strictly on Subjective Criteria.

Even if this Court were to review Petitioner's newly asserted claim for racially discriminatory discharge, there would be no basis for a reversal of the summary judgment order. First, there is no rule of law that summary judgment is *per se* inappropriate where the reasons for the adverse employment action are based purely on subjective criteria. *See Chapman v. AI Transport*, 180 F.3d 1244, 1249-50 (11th Cir. 1999). In addition, the legitimate reasons for Wadibia's discharge articulated by Auburn were *not* all based on subjective criteria, and thus Wadibia's basic premise is flawed. Among the non-subjective reasons for Wadibia's termination which would have been completely sufficient in and of themselves were the written student evaluations, Wadibia's repeated refusal to

meet with his supervisor, his threats against Auburn and his Department Head, his failure to secure research funding, and his decision not to submit documentation of his work and efforts to improve his performance. Thus the very premise which underlies Wadibia's argument – that decisions were made based on subjective criteria and are thus inherently suspect – must be rejected.

CONCLUSION

Wadibia advances no legitimate basis for this case to be reviewed on certiorari. He argues that the decisions below conflict with *St. Mary's*, but that case is essentially irrelevant because (i) the district court disposed of this case for reasons which made any analysis of pretext unnecessary and (ii) Wadibia did not provide the district court with substantial evidence that Auburn's stated reasons for its actions were untruthful or otherwise pretextual. Wadibia is essentially asking this Court to correct what he perceives as error by the district court and Eleventh Circuit in applying settled rules of law which, under Rule 10, is not a normal basis for granting certiorari.

Wadibia's second argument is that review is appropriate to address a conflict *within* the Eleventh Circuit, but certiorari is not ordinarily granted on such grounds. In any event, the proposition on which the alleged intra-circuit conflict is based – that employment decisions based on subjective criteria are inherently suspect and that challenges to such decisions cannot be defeated at the summary judgment stage – is not supported by the undisputed facts in this case. There is, moreover, another

compelling reason for denying certiorari. Wadibia seeks review of a claim – racially motivated termination – that was not asserted in the district court.

For the foregoing reasons, the petition for certiorari is due to be denied.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13649
Non-Argument Calendar

D.C. Docket No. 98-00722-CV-BH-M

E. CHUMA WADIBIA,

Plaintiff-Appellant,

versus

AUBURN UNIVERSITY,
R. LEE EVANS, in his individual
and official capacities,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

(January 25, 2000)

Before BIRCH, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

Appellant E. Chuma Wadibia ("Wadibia") appeals the district court's grant of summary judgment in favor of the defendants on Wadibia's claims of race and national origin discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as amended, and supplemental state law claims for breach of contract and intentional infliction of emotional distress.

This court reviews a grant of summary judgment *de novo*. *See Korman v. HBC Florida, Inc.*, 182 F.3d 1291, 1293 (11th Cir. 1999).

After reviewing the record, we conclude the district court correctly granted summary judgment in favor of the defendants. Accordingly, we affirm the district court's judgment based on its well-reasoned order filed on August 26, 1999.

AFFIRMED.

Excerpts from Plaintiff's Amended Complaint

* * *

CAUSES OF ACTION

A. RACIAL DISCRIMINATION

19. The act of Defendants allowing a racially hostile environment, and their failure to discipline the Caucasian employee who created the hostile environment, and their threat of denying your Plaintiff tenure, along with the racial epithets, indicates a policy of Defendant to discriminate against Blacks on the basis of race and is evident of disparate treatment in the work place. Plaintiff asserts that had he been a Caucasian employee, he would not have been subjected to such hostility and would have not been treated in such derogatory manner.

B. NATIONAL ORIGIN DISCRIMINATION – TITLE VII

20. Your Plaintiff is a native of Nigeria, Africa. Your Plaintiff has a heavy accent, but speaks the English language fluently. Your Plaintiff asserts that he was being harassed by his co-worker based upon his national origin. Your Plaintiff maintains that had he not been a Nigerian, he would not have had to endure such hostile treatment.

C. RETALIATORY DISCRIMINATION

21. During the course of his employment, your Plaintiff experienced retaliation by his supervisor and Defendant

Evans. Your Plaintiff went to his supervisor and complained that a co-worker was harassing him. Defendant Evans blamed your Plaintiff and stated that he was being placed on administrative leave and that he would be investigated. Thereafter, your Plaintiff's student enrollment in his class dropped considerably and was told that he wouldn't be tenured. Furthermore, prior to the EEOC complaints, your Plaintiff's evaluation was excellent. However, subsequent to the EEOC complaints, your Plaintiff received an evaluation which is confusing and demeaning and which places your Plaintiff in a false light. Your Plaintiff asserts that he engaged in a prior protected activity [filing EEOC complaints]; that Defendant Evans knew of the complaints; and that there is a causal connection with the acts of the defendants and the filing of his complaints. Your Plaintiff strongly asserts that he was treated in such hostile manner since he complained about the harassment he had endured in the workplace.

22. Next, your Plaintiff asserts retaliatory discrimination as a direct result of filing this lawsuit. Your Plaintiff asserts that this lawsuit was filed July 10, 1998. Defendant Evans became aware of the lawsuit when he was personally served with notice of the pending action. Thereafter, in February 1999 and during the pendency of this lawsuit, Defendant Evans terminated my employment based upon poor performance. Plaintiff asserts that said reason is simply pretextual since the mid-term binder [used for evaluation purposes of tenured track professors] had not been given adequate consideration by

Plaintiff's supervisor, Robert Smith and his student clerkship enrollment was nonexistent. Based upon the foregoing, your Plaintiff asserts retaliatory discrimination in violation of Title VII of the 1964 Civil Rights Act.

D. FIFTH AND FOURTEENTH AMENDMENTS

23. That your Plaintiff's Fifth and Fourteenth Amendments were violated when Defendant Evans suspended your Plaintiff from his tenured-track job and deprived your Plaintiff of his liberty and property without due process of law.

* * *